

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 27, 2008

**STATE OF TENNESSEE v. DEXTER MCMILLAN**

**Appeal from the Criminal Court for Knox County**  
**Nos. 83204, 84667, 84674     Bob R. McGee, Judge**

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**No. E2008-02626-CCA-R3-CD - Filed January 4, 2010**

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The defendant, Dexter McMillan, appeals the revocation of his probation. Because the defendant's sentences in case numbers 83204 and 84667 expired prior to the filing of the initial revocation warrant in this case, we reverse the revocation of the defendant's probation and dismiss the violation warrants in those cases. In case number 84674, the defendant's misdemeanor sentences expired prior to the filing of the initial revocation warrant, but his single two-year sentence for felony evading arrest did not. Because the State established that the defendant violated the terms of his probation in case number 84674, the judgment of the trial court revoking the defendant's probation on his two-year sentence for felony evading arrest is affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Dismissed in Part; Affirmed in Part**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and D'artagnan Perry, Knoxville (at trial), for the appellant, Dexter McMillan.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Takisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On October 2, 2006, the defendant, Dexter McMillan, entered pleas of guilty in case number 83204 to one count of driving under the influence ("DUI"), a Class A misdemeanor, and driving on a suspended license, a Class B misdemeanor. On that same date, he entered guilty pleas in case number 84667 to two counts of assault, a Class A

misdemeanor; one count of driving on a suspended license, a Class B misdemeanor; and one count of resisting arrest, a Class B misdemeanor. Finally, he entered guilty pleas in case number 84674 to one count of DUI, a Class A misdemeanor; one count of driving on a suspended license, a Class B misdemeanor; one count of possession of drug paraphernalia, a Class A misdemeanor; one count of simple possession of cocaine, a Class A misdemeanor; one count of resisting arrest, a Class B misdemeanor; and one count of felony evading arrest, a Class E felony. Pursuant to a plea agreement between the parties, the trial court imposed the following sentences:

Case Number	Conviction	Sentence	Sentence Expiration
83204	DUI	11 months, 29 days	October 1, 2007
83204	driving on suspended	six months	April 2, 2007
84667	assault	11 months, 29 days	October 1, 2007
84667	assault	11 months, 29 days	October 1, 2007
84667	resisting arrest	six months	April 2, 2007
84674	DUI	11 months, 29 days	October 1, 2007
84674	driving on suspended	six months	April 2, 2007
84674	drug paraphernalia	11 months, 29 days	October 1, 2007
84674	simple possession	11 months, 29 days	October 1, 2007
84674	resisting arrest	six months	April 2, 2007
84674	felony evading arrest	two years (to be served as one year, 250 days probation)	June 8, 2008

The trial court ordered the sentences in case number 83204 to be served concurrently to each other and to the sentence imposed in case number 84674. The court ordered the sentences in case number 84667 to be served concurrently to each other and to the sentence imposed in case number 84674. Finally, the court ordered the sentences in case number 84674 to be served concurrently to each other. The total effective sentence was, therefore, two years.

On October 12, 2007, a probation violation warrant issued alleging that the defendant had violated the terms of his probationary sentence by incurring new charges of

driving on a suspended license, DUI, violating the implied consent law, reckless driving, and driving on a revoked license. Following the appointment of counsel, the trial court held a hearing on the revocation warrant. By order entered February 21, 2008, the trial court revoked the defendant's probation in case number 83204 despite noting that the probationary sentence expired on October 1, 2007, some 11 days before the filing of the violation warrant. The court placed the defendant "back on State Probation to expire February 20, 2009." The court reached the same result in case number 84667, despite noting again that the probationary terms in that case had expired on October 1, 2007. Finally, the court reached the same result in case number 84674 even though only the defendant's two-year sentence for felony evading arrest remained unexpired at the time of the filing of the probation violation warrant.

On July 10, 2008, a second violation warrant issued alleging that the defendant had violated the terms of his probation by incurring a new charge of domestic assault. On October 15, 2008, the violation warrant was amended to include allegations that the defendant violated his probation by incurring new arrests for assault, vandalism, and resisting arrest; failing to report his new arrests; and failing to pay court costs and probation fees. On October 31, 2008, the defendant filed a "Writ of Mandamus" alleging that he was being illegally detained because his "sentence of probation has expired June 9, 2008, in which even before June 9, 2008." He claimed that he was "placed on an illegal one year State probation from the February 21, 2008 Revocation Hearing." The trial court denied the defendant's petition for writ of mandamus, holding that it was without authority to issue a writ of mandamus. On November 21, 2008, the trial court again revoked the defendant's probation in case numbers 83204, 84667, and 84674 even after it noted that 10 of the defendant's 11 sentences imposed on October 2, 2006, expired either on or before October 1, 2007, 11 days before the filing of the first probation violation warrant.

In this appeal, the defendant challenges the November 21, 2008 revocation orders, and the State contends that revocation was proper.

The decision to revoke probation rests within the sound discretion of the trial court, and this court will not disturb the trial court's ruling in the absence of a showing that the trial court abused that discretion. *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001) (citing *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991)). The trial court also retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995). To establish an abuse of discretion, the defendant must show "that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." *Harkins*, 811 S.W.2d at 82 (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief will be granted only when "the trial court's logic and reasoning was improper when viewed in light of the factual

circumstances and relevant legal principles involved.’” *Shaffer*, 45 S.W.3d at 555 (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)).

It is well settled that a “revocation may only occur ‘within the maximum time which was directed and ordered by the court’ or in other words, within the probationary period.” *Shaffer*, 45 S.W.3d at 555 (quoting T.C.A. § 40-35-310). The filing of a revocation warrant, however, “commences the revocation proceedings and thereby interrupts the running of the probationary period ‘until such time as the trial court [may] hear and determine the issue raised by the [warrant].’” *Id.* (quoting *McGuire v. State*, 292 S.W.2d 190, 193 (Tenn. 1956)) (alteration in original).

### *I. The Misdemeanors.*

Although apparently unnoticed by either the parties or the trial court, the first probation violation warrant was issued in this case on October 12, 2007, 11 days after the sentences for the defendant’s class A misdemeanor convictions had expired and more than six months after the sentences for his class B misdemeanor convictions had expired. The judgments explicitly provide that the 11-month and 29-day sentences are to expire on October 1, 2007, and that the six-month sentences are to expire on April 2, 2007. There is no evidence that a probation violation warrant was issued at any time before these misdemeanor sentences expired. In consequence, the trial court was without authority to revoke the defendant’s probation in case numbers 83204 and 84667 and in the misdemeanors in case number 84674 when it initially did so in February 2008. At that time, the trial court retained the authority to revoke the defendant’s probation only on his two-year sentence for felony evading arrest in case number 84674, as that was the only sentence that had not expired prior to the filing of the probation violation warrant. As a result, the trial court’s February 21, 2008 order revoking the defendant’s probation in the misdemeanor cases and extending the defendant’s misdemeanor sentences was a nullity. *See, e.g., State v. Anthony*, 109 S.W.3d 377, 382 (Tenn. Crim. App. 2001). Because the defendant’s misdemeanor sentences (all convictions in case numbers 83204 and 84667 and all but one conviction in case number 84674) had expired, the trial court was without authority to revoke the defendant’s probation in these cases in November 2008.

Accordingly, the trial court’s order revoking the defendant’s probation in the misdemeanor cases in case numbers 83204, 84667, and 84674 is reversed, and the probation violation warrants are dismissed.

### *II. The Felony*

Relative to the felony sentence for evading arrest, the trial court had jurisdiction to revoke the probation. In the revocation hearing, Knoxville police officer

Joseph Huckleby testified that he was in the Magnolia Café on October 8, 2008, when the defendant attempted to enter with a bottle of alcohol hidden beneath his coat. The defendant surrendered the bottle to the officer and entered the café, an establishment where alcoholic beverages are sold. The officer testified that, after the defendant left the café, a waitress informed him about a disturbance outside. The officer looked out and saw the defendant standing beside the driver's window of a sport utility vehicle parked at a gas station across the street. The officer testified that the defendant was cursing loudly and that the defendant twice punched the female driver of the vehicle. When the officer approached the defendant to investigate, the defendant struggled to pull away from the officer and began running, only to stop when a second officer arrived in a patrol car. Officer Huckleby testified that the defendant appeared to be intoxicated. The officer testified that the defendant was arrested for assault.

A probation officer testified that the defendant's failure to report the assault arrest was a violation of his probation. She also testified that visiting an establishment where alcoholic beverages are sold would be a violation of probation.

The defendant testified that Officer Huckleby fabricated his testimony, and he delivered a long, rambling monologue about how he had been historically mistreated by the police, the assistant district attorneys general, and the judicial system.

The trial court found that the defendant had violated his probation by failing to report the assault arrest and by visiting the Magnolia Café. It ordered him to serve his two-year sentence for felony evading arrest.

Based upon the testimony in the revocation hearing and the findings rendered by the trial court, we hold that the record supports the conclusion that the State established a violation of probation by a preponderance of the evidence and that the court acted within its discretion in ordering confinement for the sentence as originally imposed.

### *III. Conclusion*

Because the defendant's misdemeanor sentences expired prior to the filing of the initial probation violation warrant in this case, the probation revocation as to those convictions is reversed, and the probation violation warrants are dismissed. The revocation of the single felony sentence in case number 84674 is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE